

Mar. 10

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A  
L E T T E R  
TO THE  
RIGHT HONOURABLE  
WILLIAM Lord MANSFIELD, &c.

[ Price One Shilling. ]

P. 65.

THE LIFE OF

TO THE

RIGHT HONOURABLE

WILLIAM LORD MANSFIELD

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A  
L E T T E R  
TO THE  
RIGHT HONOURABLE  
WILLIAM LORD MANSFIELD,

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Lord Chief Justice of the

COURT OF KING'S BENCH:

P R O V I N G

That the SUBJECTS of ENGLAND, lawfully  
assembled to Petition their KING,

O R

To Elect or Instruct their REPRESENTATIVES,  
are intitled to FREEDOM OF DEBATE;

A N D T H A T A L L

Suits and Prosecutions for exerting that RIGHT,

A R E

UNCONSTITUTIONAL and ILLEGAL.

By JOHN MISSING, Esquire,  
BARRISTER of the INNER-TEMPLE.

L O N D O N:

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Rec. March 11, 1904.



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## L E T T E R, &c.

MY LORD,

**Y**OUR Lordship, I hope, will forgive the Liberty I take in addressing this public Letter to your Lordship, without previous Leave so to do: The Subject is important, and deserves to be fully considered; and as it is a Question of Law, to whom can it be so properly addressed as to the first Judge of Law in this Kingdom? It is not, my Lord, from Vanity that I attempt this, or that I have Presumption enough to suppose I can instruct your Lordship; for no Man can entertain a higher Opinion of your  
Lordship's

Lordship's great Knowledge and consummate Abilities than I do; but the Doctrine I seek to establish having been in public lately declared to be NEW, I am thereby called upon to vindicate it to the Public, and prove it, if I can, as old as, nay, to be the very Corner-Stone of the Constitution; without which the Rights of the People are merely nominal, and can no longer be enjoyed than Kings and Ministers think fit to be indulgent. I aim not, my Lord, at the Fame of an Author, and readily confess my Want of the Talents requisite for such an Undertaking; but though I have not the Honour to be much known to your Lordship, my own Knowledge of your Lordship's Judgment renders me confident, that the plain Sentiments of a plain Man, though expressed in unpolished Language, will not be unfavourably received by you, if Truth only be sought after, and fair Means used to discover it, and I shall therefore trouble your Lordship with no farther Apology.

The

The Position I mean to prove, my Lord,  
 is, "That the Freeholders of a County law-  
 " fully assembled to petition their King for  
 " a Redress of Grievances, or to Elect or  
 " give Instructions to their Representatives  
 " in Parliament, have a legal Right to Free-  
 " dom of Debate; and that all Suits and  
 " Prosecutions against them for exercising  
 " that Right, are illegal."

Your Lordship will allow me to assume  
 what has never yet been denied, that "There  
 " is such a Thing as Constitutional Liberty,  
 " which Englishmen are intitled to; that  
 " when carried beyond its true Point it  
 " degenerates into Licentiousness, and tends  
 " to Anarchy; and when too much restrain-  
 " ed and narrowed, it loses the Name of  
 " Liberty, and verges towards Slavery."  
 This true Point of Liberty, my Lord, con-  
 sists in the perfect Freedom of doing or not  
 doing whatever the known and established  
 Laws forbid not, and, à fortiori, of doing or  
 not



not doing what known and established Laws expressly allow, but command not.

It will not be proper for me to attempt to prove, that there are no known and established Laws which forbid the Exercise of the Right I have laid down, in the Position I mean to maintain; that, your Lordship knows, would be attempting to prove a Negative, which cannot be proved; all I shall therefore say on this Head, is, that I know of no such Laws; and it is incumbent on those who think fit to oppose the Position, to point them out; for *Actori incumbit Onus probandi*, your Lordship knows, is a Maxim of Law, which whoever disputes, according to another Maxim, is not worthy to be disputed with.

The Task I have taken upon myself, obliges me only to shew to your Lordship, that there are known and established Laws which expressly allow the Freedom of Debate



bate I contend for; and that these are not NEW Laws, but as old as, and indeed the most essential Part of the Constitution, if, as a most learned Judge in his late Commentaries on the Laws of England justly says\*, "Liberty is the very End and Scope of it."

That the Subjects of this Kingdom have, and always had a legal Right to petition their King, I should think at this Time of Day can scarce be doubted by any one; that they have is clearly established by the Statute of 1st of *William and Mary*, ch. 1. sess. 2. which enacts expressly, "That it is the Right of the Subjects to petition the King, and that all Commitments and Prosecutions for such petitioning are illegal:" And your Lordship knows that this Statute is made only in Affirmance of the Common Law, enacting nothing NEW; but the Lords and Commons in that Parliament assembled did claim, demand and insist upon this, as

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\* Blackstone's Commentaries, vol. I. p. 6.

Part of their then undoubted Rights and Liberties. This being therefore declared to be Part of the Common Law, by the above-cited Act of Parliament, your Lordship need not be told that the Common Law is more ancient, than that any Histories, Law-Books or Records can assist us to trace it; but though Histories, Law-Books and Records fail us, there is a Mode, my Lord, of discovering its Origin, and if this should lead us very far back into Antiquity, yet by a due Use of Common Sense, we shall run no Hazard of getting into Fable, even tho' we derive its Birth from Heaven; for, my Lord, if we ever so little exert our rational Faculties, we shall see, this Part of it at least, to be the Law of Nature, which is the Law of God. How, when or where Government was first formed, would here be a needless Inquiry, for the first Subjects of the first Monarch that ever reigned, when oppressed by himself, his Ministers or others,

had

had a natural Right to petition him for Redress, who was, or ought to have been, their common Father. The Right to complain when injured, is the Right of Human Nature, it is the main End of Peoples submitting to Government; it is the Origin of all Human Laws; and all Courts of Justice are established only to hear and redress Grievances; so that your Lordship sees this is no NOVEL Institution, it is as old as human Nature itself, and the immediate Law of God; and if ever there was a Prince wicked enough to deny this Right to his Subjects, he ceased to be a legal Prince, and \* all Laws made to take away this Right, if any such were ever made in any Country, being against the Law of Nature, were in their Natures absolutely void.

The Right of the Subjects to petition their King is clearly established in your Lordship's Mind already, much better by

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your

\* Blackstone's Commentaries, vol. I. p. 41.



your Lordship's own Knowledge than by any Argument I can make use of; I hope too it sufficiently appears that this is no new Doctrine, but has always been the Law of this and all other Kingdoms; and from hence a very strong Argument may be drawn in Favour of Monarchy, and to shew why that Form of Government is preferable to all others. In Republics of every Denomination the Pater Patriæ is wanting; the Lords, the Senators, the leading Men, have each their private Schemes, and private Enmities; hence the Poor are oppressed, and there is none to relieve; for one great Man, to be indulged in his own Acts, winks at the Faults of others; and if there should be some few inclined to redress the People, they want the Power to repress the Violence of their Equals; but in a Monarchy, the King has no Equal; he has Power to redress his petitioning Subjects, and it is his Interest as well as his Duty so to do; for he can have no separate Interest from that of his People.

But



But enough of this, it being not very closely connected with my Subject.

If, my Lord, the Subjects have a Right to petition, they have by Law a Right to every Thing included in, or necessary to the Enjoyment of the Principal Right: The greater Right includes in it the less, for “*Omne majus continet in se minus,*” says Law as well as Common Sense; and when the Law gives a Right, it gives every Thing necessary to the Enjoyment of it; “*Quando* “*Lex aliquid concedit, concedere videtur* “*et id, sine quo Res ipsa esse non potest;*” These two Maxims of the Common Law are not NEW, my Lord; they are as old not only as the Constitution of this Kingdom, but as the Right of petitioning itself: They are as old as Common Sense and Human Nature. There never was a Time when the greater Power, or greater Right, did not include the Less; any more than there ever was a Time when the Whole did not equal, and  
include

include in it all its Parts; nor was there ever a Time when a Man had a legal Right, without a lawful Power over every Thing necessary to enjoy his Right. Thus, my Lord, it is plain the Law of England, deduced from its true Source, the Grounds and Maxims of it, as far as I have for this Purpose examined them, (and from them one may guess well at all the Rest,) is but that Law of God and Nature, which plain common Sense is able to point out to every Man; and from hence arises one obvious Observation, that such was the good Sense of our Ancestors, which appears in the System of Laws they have handed down to us; that whoever attempts to subvert these Laws must militate with God and Nature, and however they may be obscured for a Time by the Fume of *sophistical* Argument, or borne down by the Hand of *Russian Violence*, they will at last burst forth again in their native Lustre, and can never be destroyed as long as the World endures.

It

It only remains therefore to be proved, that the Right of petitioning cannot be fully enjoyed, without the Freedom of Debate contended for ; and that, my Lord, appears to me as apparent, as that when the Sun shines upon us, it gives us Light, if we have Eyes capable of receiving its Impressions ; for if the Subjects, have a Right jointly to petition, they must have a Right to assemble for that Purpose ; to assemble only will not enable them to do the Business, for unless some Person can acquaint them with the Cause of their being assembled, and point out to them the Grievance wanting Redress, the whole is nugatory and vain ; nor is this sufficient, for either they must take upon Trust what the first Mover states to them, and therefore petition with, or without just Grounds, as it may happen, which is an Absurdity too gross to suppose ; or they must examine the Grievance laid before them, discuss every Question involved in the Proposition made to them, and after a full and  
free



free Debate, judge that a Petition is, or is not expedient under the Circumstances then fully understood by them : If the Grievance complained of is the evil Conduct of Ministers, that Conduct must be examined into, their Names, and the Particulars of their Mal-administration ; and whoever seriously denies this necessary Freedom of Debating the Matters proposed, denies in Effect the Subjects Right to petition, in defiance of the before-cited Act of Parliament, the Maxims of the Common Law, the Dictates of common Sense, and the permanent and invariable Laws of God and Nature.

If therefore, my Lord, it be true that the Subjects have a Right to petition ; if it be equally true, that this Right cannot be fully and properly enjoyed without Freedom of Debate, when the Freeholders are assembled to carry their Right into Execution ; if there are Maxims of Law establishing expressly that the inferior Right is included in the greater,



greater, and that the Law gives every Thing necessary to the Enjoyment of a Right, when it gives that Right, it follows of Course the Doctrine contended for is not a NEW Doctrine, but is as ancient as the principles from whence it is drawn; for in all past Ages it was always as true as it is now, and in all future Ages it must invariably continue the same: Truth is not NEW, but has existed the same from the Beginning; human Reason and Common Sense are not to be reckoned as NOVELTIES, and if this is the fair Deduction of Reason and Common Sense from the Premises, the Premises and the Conclusion are equally true, and must stand or fall together; and whoever denies one, must deny the other, whoever says the Conclusion is NEW, must assert the same of the Premises.

That the Freeholders of a County have a legal Right to instruct their Representatives your Lordship, I believe, entertains no doubt; nay it is too obvious to Common Sense for  
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the plainest Man long to hesitate in giving his Assent to it ; the very Idea of Representation, carrying with it a Conviction of the Mind, that the Representative is but the Servant, or Agent of his Constituents ; and as it is their Business he is to transact, they cannot in the Nature of Things have so far given up their Concerns into his Hands, as not to have a Power of interfering, at least as far as giving him their Instructions. Formerly in this Kingdom every Freeholder attended in the great Council of the Nation in Person, but these Meetings growing too great and too tumultuous for the regular Transaction of Business ; the Mode of Representation as to the smaller Freeholders, was substituted in the stead of personal Attendance. Will it be said, my Lord, that these Freeholders had not a Right to speak freely in the great Council when they personally attended ? Nay, do not their Representatives at this Day exercise this Right in their Behalf ? Or can it be supposed that when they elected a Representative, they so far

far gave up their Power, that though they may instruct him, they have not reserved legal Authority to debate, and consult together on the Matters they mean to include in their intended Instructions? Or may they not assign, freely assign their Reasons, why they think it better to petition their King, than to instruct their Representatives? Bad Men, my Lord, may be chosen in Time to come, and have been in Ages past to represent the People; and shall it be said that when the Freeholders are convinced their Representatives are corrupt, (suppose, my Lord, corrupted by some foreign Power) shall it be said, my Lord, that in that Case they may not debate upon this, and rather choose to petition their Sovereign than to instruct such Representatives? And if they may lawfully make this Election, they may as lawfully assign their Reasons to each other for preferring one Mode of proceeding to the other: Besides, my Lord, the same Principles and Reasons apply here as strongly as in the former Case; If they have a Right



to instruct their Representatives, they must have Power to assemble for that Purpose; it is in vain to assemble if they cannot when assembled communicate their Sentiments to each other, for without such communication they can never agree upon Instructions; if they may communicate their Sentiments, they must be able to do it freely, fully, and without Reserve, or such restrained Power of communing will be of no Use; therefore, whoever denies them this Right, in effect denies them the Right of instructing their Members. Again, my Lord, if the Freeholders have legal Authority to elect their Representatives, they must have Power to assemble for that Purpose; they must have Power to nominate their Candidates; they must have Power freely to examine into their Merits and Demerits; if their former Representatives are again proposed they must have a Right either to censure or applaud their former Conduct; or it is in vain to say they have the Right of Election; whoever denies them one, must deny them the other,

for



for they are both so connected that they cannot separately exist. And this, my Lord, is no NEW Doctrine; it must be as old at least as Representation in this Kingdom, and if ever there was such a Representation in very ancient Times, it must then have existed also; for it is not positive Law, but the Result of the Nature of Representation: The People could not have reserved to themselves the Rights of Election and Instruction without reserving also all the inferior Rights included in, and essential to the Rights of Election and Instruction.

But it has been said, my Lord, that “the Law protects the Characters of Men,” and true it is it does so; it guards still stronger the Lives of Men, my Lord, and yet there are many Instances in which the Lives of Men may be justifiably taken away, without applying to a Court of Justice. If *A.* attempt to rob *B.* upon the Highway, or to murder him, or to break his House in the Night-time, with Intent to commit Felony, *B.* may

*B.* may justify the putting *A.* to Death; and the true Reason is, my Lord, the Law of Nature, with which the Laws of England always correspond, authorizes him so to do; and by Parity of Reason if a Minister shall seek to enslave, or destroy his Country, or a Representative his Constituents, (Crimes of a much deeper Dye than those for which it is lawful to deprive an Offender of his Life) the Freeholders when assembled to consult on petitioning their Sovereign, or to instruct their Representatives, may lawfully convey to each other their Ideas of the Misconduct of such Minister, or Representative, even though the Character of such Minister, or Representative should be impaired in Consequence; for the Law does not so strongly guard the Characters as the Lives of Men; and both in many Cases may justly and justifiably be taken away. There may be some Art shewn, MY LORD, in placing two Maxims of Law, of apparent contrary Tendency, in Opposition to one another; and it may be sophistically argued that therefore  
neither

neither can operate, because two equal Forces counteract and destroy each other; as for Instance these two Positions, the Right of Freedom of Debate in the Freeholders, when assembled to petition against an evil Minister, authorizes them in their Petition, or their Debate to censure him; but the Law protects the Characters of Men, and that makes such Censure illegal; this Sophism however, MY LORD, is easily detected, for the Law protects the Characters of Men only sub Modo: In a Petition to Parliament, a Bill in Chancery, or Proceedings at Law, even libellous Words will not make a Man guilty of publishing a Libel; why then, my Lord, in a Petition to the Sovereign? Are not the Meetings of the Freeholders to consult on Petitions to their Sovereign as lawful Assemblies as any in the Nation? And is not the Exertion of that grand Right of the Subjects, of rather something more general Importance, and as favourably at least regarded by the Law, as the Petition of a private Individual to Parliament, or the private Suit  
of



of an Individual, in a Court of Law or Equity? The Common Law, my Lord, which  
 “ has worked itself pure by Rules drawn  
 “ from the Fountain of Justice \*,” and is a  
 Collection of the Wisdom of all past Ages,  
 is not so easily set to militate with itself, as  
 those who have studied our Laws from  
 Abridgments only may suppose; but if two  
 Maxims flatly contradictory to each other  
 could be produced, we have this Clue still  
 left to guide us, that the Maxim of the least  
 general Importance must give Way to the  
 greater: The great and learned Lord BACON  
 says in his Treatise on the Maxims of the  
 Common Law, “ It is a Point worthy to be  
 “ observed generally in the Rules of the  
 “ Law, that when they encounter, and  
 “ cross one another in any Case, it be un-  
 “ derstood which the Law holdeth worthier  
 “ and to be preferred;” and which, my  
 Lord, may we safely pronounce here to be  
 of the most general Importance, those  
 Maxims which support the Principal Rights  
 of

\* Atkyns's Reports, vol. I. p. 33.

of all the Commons of England, or that which protects the Characters of Individuals? Or which may we understand here the Law holdeth worthier, and to be preferred? The Question need only be put, and the Answer is obvious, *Pereat unus ne pereant omnes*, which your Lordship knows is another Maxim of Law, as well as a Part of the Law of Nature, and both these Laws say a particular Mischief shall rather be endured than a general Inconvenience: We may safely therefore pronounce, my Lord, that though the Law protects the Characters of Men, yet the Character of an Individual can bear no Competition in the Eye of the Law, when put in Opposition to the general Interest.

It may also be said, my Lord, and it has been hinted to me in Conversation by very well-meaning Men, that although the Freeholders when assembled for any of the before-mentioned purposes are entitled to Freedom of Debate, yet the Law ought to confine them, with Respect to what may affect the

D           Reputations

Reputations of others, to Truth; and that unless when legally called upon to justify their Words, they can prove the Truth of them, the Speakers ought to be liable to Actions. This Objection to that Latitude of free Debate I contend for, is more specious than the former, but not less destructive to the Constitution; it is indeed more dangerous, being more likely to be admitted by the unwary, as not taking away the Right of debating; but only confining it within certain Bounds which at first View may seem to be reasonable; but these Gentlemen should consider, that if such Checks of Law are to be holden over the Debates of the Constituents, by Parity of Reason their Representatives in Parliament, who sit and debate in the House in their Right only must be liable to the same Restraints; which I think no Man can be weak enough to admit; because if our Representatives are to be awed from censuring the Conduct of bad Ministers in Parliament by Actions at Law, and put to produce *legal* Proof of the Truth of their Words



Words to defend themselves in such Actions, it is easy to foresee that Ministers may soon trample with Impunity both upon the King and the People: and why the Constituents when met to instruct their Representatives to oppose the Measures of such Ministers, should be under any greater Restraint than their Representatives, I own I am not able to discover: Representatives may be roused by such Instructions to do their Duty; and the Nation may in Consequence be rescued out of the Hands of an evil Minister, who means to ruin and enslave his Countrymen or sell them to a foreign Power; but such Instructions can never be had without Freedom of Debate, and Freedom of Debate will never be used, if Actions at Law are to follow; for who is the bold Freeholder, who at such a Meeting will stand up and tell his Brethren that the Minister appears to him to *intend* the Introduction of Slavery, and that therefore he is for instructing their Representatives to cause his Conduct to be examined, if an Action at the Suit of that Minister may be

brought against him for these Words? Or how in such an Action shall he make *legal* Proof of the Truth of his Words, even supposing them true?

And if this be the Case with Respect to a Minister, the Constituents, at all public Meetings for the Purposes of electing or instructing their Representatives, ought to have no Restraint on their examining into the Conduct of those they mean to elect, or instruct. To what End should they instruct those Representatives who already act as their Constituents with them? Whenever Instructions are wanting, it must be generally supposed that the Constituents are not *fully* satisfied with the Conduct of their Representatives: The desired Conduct is necessary therefore to be pointed out, and debated upon, at the Meeting of the Constituents; and how far the present Conduct of their Representatives falls short of their Desires; and these Points must be fully examined

ed into, which, in the Nature of Things, cannot be done without some Censure, more or less according to their Ideas of the greater or less Impropriety of the present Conduct of their Representatives : And if on such Examination, they should apprehend a Representative, so forgetful of the Relation he bears to them, as to neglect their Instructions, or frequently to have promised to observe them, but to have performed nothing, they must also in the Nature of Things have a Right to censure this Behaviour, and to declare their Want of Dependence on the Promises of such a Representative ; and this may therefore be justifiably assigned as a sufficient Reason why they should apply to the Throne for Redress, instead of proceeding in the usual Mode of Instruction : But if Actions are to be brought for Words spoken in these Debates, and every Man be obliged to prove by *legal* Evidence the Truth of his Words to defend himself, there is at once an End of these Meetings ; for most of the Words which  
must



must be spoken at any such Meeting are incapable of being *legally* proved to be true, and yet may be held defamatory ; as for Instance, suppose these Words spoken by a Freeholder, “ The Conduct of our Representative *A. B.* has been such for some Time past, that I have no Confidence in his Promises, and I am therefore for petitioning the Throne, instead of Instructing him.” There can be no greater Censure of a Representative’s Conduct than these Words contain ; they may therefore be construed defamatory ; and, on an Action brought, this Freeholder *cannot* defend himself by proving the Words true, for they are incapable of *legal* Proof ; but, my Lord, it appears to me, that upon the true Principles of our Constitution, it is a sufficient Defence for such Freeholder to shew, that the Words were spoken by him at a public Meeting of the Freeholders, assembled to debate on instructing their Representatives ; and if it be not so, no Freeholder can safely be present, or  
offer

offer his Sentiments at such a Meeting, which must not only put a final Stop at once to petitioning the Throne, and instructing Members; but must at the same Time give up into the Hands of Ministers our Liberties, Lives and Properties: and whether this be a desirable End, I leave your Lordship and the Public to judge.

Thus, my Lord, I think I have proved, that the Freeholders lawfully assembled to petition their King, or to elect or instruct their Representatives, are by Law entitled to Freedom of Debate; I have answered the only Objections I have yet heard made to it, and the Consequence is plain and clear, that if they are so entitled, all Suits and Prosecutions against them for exerting this Right are illegal; for that those may be lawfully sued or prosecuted who act lawfully, is an Absurdity too gross for any one to maintain; and this Right being included in, and an essential Part of the Rights of Petitioning, such Suits and Prosecutions on account of any

any Debates concerning Petitions to the King, are by the Statute of the 1st of *Will.* and *Mary* expressly declared to be illegal: I think too I have sufficiently proved this Freedom of Debate to have always existed, and to be no NEW Doctrine; but whether this be done to the Satisfaction of your LORDSHIP I have not the Presumption to guess. My Desire of elucidating this material Part of the Constitution, is the only Excuse I can make to your Lordship, or the Public, for the Faults of the Execution of my Design, and I hope some abler Hand will be incited to re-examine it, and make Amends for my Defects.

I have the Honour to be,

M-Y LORD,

*Your Lordship's most obedient Servant,*

INNER-TEMPLE,  
1<sup>st</sup> Nov<sup>r</sup> 1770.

JOHN MISSING.

*Ex. C. M. B.*

*3/7/04*



